Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

GARY KENT JONES,
Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
COMMISSIONER OF STATE LANDS,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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May 2005

QUESTION PRESENTED

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to make any additional effort to locate the owner before taking the property?

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PETITION FOR A WRIT OF CERTIORARI

In the decision below, the Arkansas Supreme Court held that, when notice of a tax sale is returned undelivered, due process does not require the government to make any additional efforts to locate the owner before selling his property. The court acknowledged that other courts have held that due process requires further efforts when notice is returned, but reaffirmed its own contrary precedent. The Arkansas Supreme Court's decision deepens an already intractable conflict among the state and federal courts and also is in conflict with this Court's precedents. The question presented, which arises often in the context of tax sales and property forfeitures, is of national importance. Petitioner Gary Kent Jones petitions this Court to review the judgment below, resolve the conflict among the courts, and provide much-needed certainty to property owners, tax collectors, law enforcement agencies, and courts across the country.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a) will be published at ___ S.W.3d ___, and is available at 2004 WL 2609800 (Ark. 2004). The trial court's decision granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment (Pet. App. 12a) is unpublished. The order of the Arkansas Supreme Court denying rehearing (Pet. App. 14a) is unpublished.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on November 18, 2004. Petitioner timely sought rehearing, which was denied on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file this petition to May 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT

Petitioner Gary Kent Jones lost his house in a tax forfeiture sale because he did not receive notice until it was too late to redeem the property. The State sent two notices to Mr. Jones by certified mail, but both were returned unclaimed. Although the State knew that its attempts to provide notice had been ineffective, and although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no effort to locate Mr. Jones before selling his house. Once Mr. Jones learned that his house had been sold, he brought this action against the purchaser and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and that no further action was required to comply with constitutional due process. The Arkansas Supreme Court affirmed, but recognized that a majority of other courts have held that due process requires the government to make further efforts to locate a property owner when a mailed notice is returned.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment; Mrs. Jones

continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. ADD at 48-49.[1]

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. During April 2000, the State mailed a certified letter to Mr. Jones in an attempt to notify him of the delinquency and his right to redeem. *Id.* The notice stated that the property would be subject to a public sale on April 17, 2002. *Id.* Because the notice was sent to the Bryan Street address instead of his apartment, Mr. Jones did not receive it. Rather, the notice was returned to the State marked "unclaimed." *Id.* On April 1, 2002, a notice of the public sale was published in a newspaper. *Id.*

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. *Id.* On February 19, 2003, the State sent another certified letter to Mr. Jones at the Bryan Street address in an attempt to notify Mr. Jones that his house would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. *Id.* Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter went unclaimed and was returned to the State. *Id.*

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[1] "ADD" refers to the record excerpts included in the addendum filed with Mr. Jones's appellate brief.

Although the State knew that Mr. Jones had not received the two notices it sent by mail, the State made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale, even though Mr. Jones's proper address could have been discovered with minimal effort. Moreover, State personnel apparently visited the Bryan Street property and viewed the house as part of the negotiated sale process, but the State did not post a notice at the house. *See* SUPP ADD at 11, 26.[2]

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale. Pet. App. 2a. Even thereafter, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, an unlawful detainer notice was posted on the door of Mr. Jones's property. The occupants of the house discovered the unlawful detainer notice and contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD at 01, 11.

B. Procedural Background

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he did not receive constitutionally adequate notice of the tax sale or his right to redeem. Pet. App. 2a. Mr. Jones alleged that the State's failure to take reasonable steps to provide actual notice resulted in the taking of his property without due process. *Id.* at 3a. Ms. Flowers filed a counterclaim for unlawful detainer, and she moved for summary judgment, arguing that the two unclaimed letters sent by the State provided constitutionally sufficient

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[2]"SUPP ADD" refers to the record excerpts included in the supplemental addendum filed with respondents' appellate brief.

notice to Mr. Jones.[3] *Id.* The State filed a similar motion for summary judgment, and Mr. Jones filed a cross motion for summary judgment. *Id.*

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the Arkansas tax sale statute complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property. *Id.*

Mr. Jones appealed the trial court's ruling and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. On November 18, 2004, the Arkansas Supreme Court affirmed the trial court's decision. *Id.* The Arkansas Supreme Court held that the State had complied with the statutory scheme for tax sales, and that due process does not require the State to make any effort to discover a property owner's correct address even where the State knows that its notice has not been received.[4] *Id.* at 5a-6a.

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[3]After Ms. Flowers filed her counterclaim, Mr. Jones filed an amended complaint adding his wife as a plaintiff because she was the person living in the home at the time. Pet. App. 3a.

[4]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require actual notice to the owner of a homestead, absent proof that the notice sent by certified mail was received. As the court below recognized, the amendment has no effect on this case, Pet. App. 9a-10a. Moreover, the amendment does not diminish the mature conflict among the courts on the question presented. Even

(continued...)

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens An Entrenched Conflict On A Recurring Question Of National Importance.

A. The State And Federal Courts Are Split.

The question presented is whether, when notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional efforts to locate the owner before taking the property. In the context of both tax sales and forfeitures, there is a deep and intractable conflict on this question among the state and federal courts. *See generally* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 792 (2000) (noting a "wide variance" among the courts "in interpreting the scope of the government's duty when notice is mailed to the last known address available from the public records and is returned as undeliverable").

In the context of tax sales, "[t]he majority of jurisdictions that have addressed this issue . . . have held that the government must undertake additional efforts when the mailed notice is returned." *Id.* at 793. Most recently, the Fourth Circuit surveyed the conflicting decisions and held, based on a thorough analysis of this Court's precedents, that "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005). The Second Circuit

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[4](...continued)
within Arkansas, the question persists in cases involving all property other than homesteads.

has reached a similar conclusion. *See Akey v. Clinton County*, 375 F.3d 231, 236 (2d Cir. 2004) ("Akey's claim raises the question of what due process obligations the County incurred when her notice of foreclosure was returned as undeliverable. In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address."). The courts of last resort in numerous jurisdictions, including the District of Columbia, Georgia, Idaho, Maryland, New York, Oklahoma, and Pennsylvania, agree that the federal Constitution requires further reasonable efforts when a notice is returned.[5] Intermediate appellate courts in many other states, including Louisiana, Massachusetts, New Mexico, Ohio, and California, are in accord.[6]

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[5]*See, e.g., Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003) ("[W]e adopt and apply the majority rule requiring the tax sale purchaser, before resorting to publication, to make reasonably diligent efforts beyond the use of tax and real estate records in order to ascertain the address of the delinquent taxpayer."); *Kennedy v. Mossafa*, 789 N.E.2d 607 (N.Y. 2003) ("[W]hen the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 604 A.2d 484 (Md. 1992); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703 (Okla. 1989); *Rosenberg v. Smidt*, 727 P.2d 778, 781-83 (Alaska 1986); *Giacobbi v. Hall*, 707 P.2d 404, 408 (Idaho1985).

[6]*See, e.g., Vinscon, Inc. v. Ingram*, 835 So.2d 813, 815 (La.

(continued...)

The decision below is squarely in conflict with these decisions. The Arkansas Supreme Court acknowledged Mr. Jones's argument that, upon return of a tax sale notice, "a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address," but reaffirmed its prior precedent rejecting the majority approach. Pet. App. 10a (citing *Tsann Kuen Enters. Co. v. Campbell*, 129 S.W.3d 822 (Ark. 2003)).

Although in the minority, Arkansas is not alone in its approach. The courts of several other states, including Michigan, South Dakota, Indiana, New Jersey, and Florida, have held that the return of an undelivered notice triggers no duty to undertake additional efforts to locate a property owner.[7]

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[6](...continued)
Ct. App. 2002) (when "notice is returned to the tax collector undelivered or unclaimed, the tax collector is required to take additional steps to notify the tax debtor, and the failure of the tax collector to perform this obligation renders the tax sale null and void"); *City of Boston v. James*, 530 N.E.2d 1254 (Mass. App. Ct. 1988); *Patrick v. Rice*, 814 P.2d 463 (N.M. App. 1991); *O'Brien v. Port Lawrence Title & Trust*, 688 N.E.2d 1136 (Ohio Ct. Common Pleas 1997); *Bank of America v. Giant Inland Empire R.V. Ctr., Inc.*, 93 Cal. Rptr. 2d 626, 635 (Cal. Ct. App. 2000).

[7]*See, e.g., Smith v. Cliffs on the Bay Condominium Assoc.*, 463 Mich. 420 (2000) ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located."); *Dahn v. Trownsell*, 576 N.W.2d 535 (S.D. 1998); *Elizondo v. Read*, 588
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Courts in other jurisdictions, including Colorado and New Hampshire, have held that a diligent inquiry in such circumstances is limited to making sure that no other addresses are available from tax or deed records, but that no further duties are imposed by due process.[8]

In addition to the tax sale context, the question presented in this case frequently arises in forfeiture cases in which courts must decide whether due process requires the federal government, upon return of mailed notice of forfeiture,

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[7](...continued)
N.E.2d 501, 504 (Ind.1992); *Clark v. Jones*, 519 N.E.2d 158, 160 (Ind. Ct. App. 1988) ("Even if the auditor knew that mail was being returned from [the last known address where the tax deed sale and notice were sent], the notice statutes and constitutional due process requirements do not impose . . . a duty to search for an alternative address."); *Atlantic City v. Block C-11, Lot 11*, 376 A.2d 926, 928 (N.J. 1977) (rejecting argument that "would place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct"); *Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So.2d 528 (Fla. Dist. Ct. App. 2004).

[8]*See, e.g, Schmidt v. Langel*, 874 P.2d 447 (Colo. Ct. App. 1994) ("[W]hen, as here, notice by mail has been sent but returned as undeliverable, if a diligent search of the county records would uncover no alternative address, neither constitutional due process concerns nor statutory requirements compel the county treasurer to follow up on information which she has no reason to believe would result in the discovery of a correct address."); *Kakris v. Montbleau*, 575 A.2d 1293, 1299 (N.H. 1990).

to take further steps to locate an interest-holder. As the Seventh Circuit has noted, the "circuits have answered this question in various ways." *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000). As with the tax sale context, the majority of courts, including the Second, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits, have held that additional reasonably diligent efforts are required before the government may resort to publication or proceed with the forfeiture.[9]

Three circuits – the First, Eighth, and Seventh – have rejected the majority rule. The First Circuit has held that, absent unusual circumstances, no additional efforts are required to contact a potential claimant once a notice has been returned undelivered. *Sarit v. Drug Enforcement Admin.*, 987 F.2d 10, 14-15 (1st Cir. 1993). Similarly, the Eighth Circuit has held that, when a notice sent to a claimant's last known address is returned undelivered, further efforts to locate the claimant are not required unless the government receives notice of the claimant's new address. *Madewell v. Downs*, 68 F.3d 1030, 1047 (8th Cir. 1995); *but see Foehl*, 238 F.3d at 479

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[9]*See, e.g., United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003) ("We now join [the majority of] circuits in holding that, when initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice."); *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001); *Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994); *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996); *Armendariz-Mata v. Drug Enforcement Admin.*, 82 F.3d 679, 683 (5th Cir. 1996); *United States v. Rodgers*, 108 F.3d 1247, 1252-53 (10th Cir. 1997); *Aero-Medical, Inc. v. United States*, 23 F.3d 328, 331 (10th Cir. 1994).

(questioning *Madewell*'s analysis). Finally, the Seventh Circuit, although rejecting "a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events," has "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *Garcia*, 235 F.3d at 291.

B. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

Given the nationwide importance of the question presented, the conflict among the courts is intolerable. In the tax sale context alone, the practical consequences of the conflict are enormous. Because property taxes are the primary source of revenues controlled by county and municipal governments, "[t]he lack of clarity about the constitutional requirements applicable to property tax foreclosure procedures profoundly affects the social and financial stability of a local government." Alexander, *supra*, at 751.

Without this Court's intervention, the legal actors involved in tax foreclosure proceedings – state and federal courts, officials and private contractors who administer the proceedings, purchasers of delinquent property charged with notice under state law, and property owners – are all faced with significant confusion about what due process requires when a mailed notice is returned. "The lack of common interpretation leaves the procedures in a large number of jurisdictions subject to constitutional challenge. It also leads to dramatic inefficiencies in the collection of taxes [and] inconsistent rules and standards, and impairs the ability of local governments and property owners alike to anticipate enforcement of the obligation to pay property taxes." *Id.* at 750.

The harm to individuals and businesses caused by the confusion among the courts is at least as great as it is to local governments. This is particularly so where, as here, the sale or forfeiture concerns someone's home. As the Court has explained, cases in which the government seeks to sell a person's residence illustrate an essential principle: "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). If the conflict among the courts is allowed to stand, property owners in one state or federal circuit may lose their homes where identically situated citizens in another state or circuit would not. This unacceptable state of affairs is compounded by the possibility that federal and state courts would reach differing conclusions about what due process requires in the *same state*. *Compare, e.g., Foehl*, 238 F.3d at 479 (Third Circuit decision holding due process requires additional efforts upon return of notice sent to last known address), *with Atlantic City*, 376 A.2d at 928 (New Jersey decision refusing to "place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct"); *compare Rodgers*, 108 F.3d at 1249 (Tenth Circuit decision holding that government "must take reasonable steps to locate a civil claimant when its initial mailings are returned unclaimed"), *with Schmidt*, 874 P.2d at 452 (Colorado decision holding that, where "notice by mail has been sent but returned as undeliverable," search of county records alone is sufficient).

Although this Court's decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983), made clear that in the tax sale context the government must make "reasonably diligent efforts to provide notice,"'"[i]n the years since

Mennonite, state and local governments have struggled to develop constitutionally adequate procedures for the enforcement of property tax collections." Alexander, *supra*, at 769. Deferring review at this time will lead to further chaos and uncertainty.

II. The Decision Below Conflicts With This Court's Precedents And Is Wrong On The Merits.

Certiorari is also warranted because the decision below is wrong. It held that regardless of how easily the State might discover information that would allow it to provide effective notice after an initial notice is returned, due process requires no additional efforts. That holding is contrary to this Court's precedent requiring notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As this Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Under the *Mullane* standard, "impracticable and extended searches are not required in the name of due process," but "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Id.* at 317-18. In this case, the State could easily have located Mr. Jones's correct mailing address by reference to the local telephone directory, voter registration records, or state income tax rolls. Under *Mullane* and its progeny, the State was required to take reasonable steps to ascertain Mr. Jones's correct mailing address, but the State took no steps at all. *See Mennonite*, 462 U.S. at 800 (if a party's name and address are "reasonably

ascertainable" notice by mail or equally effective means is required).

The State had a heightened obligation to take reasonable steps to ascertain Mr. Jones's current address under the circumstances of this case, because once the notice mailed to the Bryan Street address was returned, the State knew that its initial attempt to notify Mr. Jones had been ineffective. In *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), the Court held that the State had failed to provide notice "reasonably calculated" to apprise the interested party of the pendency of forfeiture proceedings where "the State knew that the [interested party] was not at the address to which the notice was mailed." Similarly, in *Covey v. Town of Summers*, the Court held that compliance with a statute, including notice by mail, was inadequate under the circumstances because the town officials knew that the interested party was incompetent. 351 U.S. 141, 144-47 (1956) (citing *Mullane*). As discussed in section I.A. above, many of the lower courts that have considered what due process requires following the return of mailed notice have held that the *Mullane* standard compels at least some further effort to determine the correct address. *See, e.g., Plemons*, 396 F.3d at 575-76, and cases cited therein.

In concluding that due process requires no further effort to locate the correct address of an interested party when the initial notice is returned, the court below relied heavily on Mr. Jones's failure to furnish his new mailing address to the tax collector. Pet App. at 10a ("[T]he Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 [of the Arkansas Code] requires the property owner to notify the tax collector of his correct address."). This aspect of the decision below also conflicts with this Court's

precedent because "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice. *Mennonite*, 462 U.S. at 799. That some courts, including the Arkansas Supreme Court here, have failed to adhere to this principle provides a further reason to grant certiorari. *Compare, e.g., Elizondo*, 588 N.E.2d at 504 (relying on the dissent in *Mennonite* and characterizing "the interest-holder's ability to take reasonable steps to protect his interest as a crucial aspect of the balancing test"), *with Schmidt*, 874 P.2d at 452 ("Whether defendant might have taken steps to safeguard her interest is irrelevant to whether adequate notice was given under the circumstances.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2005

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[10]Counsel acknowledges the work of Deepak Gupta, a graduate of Georgetown University Law Center, who took a lead role in preparing this petition.

SUPREME COURT OF ARKANSAS

No. 04-449

GARY KENT JONES and JEAN L. JONES,

APPELLANTS;

VS.

LINDA K. FLOWERS and MARK WILCOX, COMMISSIONER,

APPELLEES;

Opinion Delivered NOVEMBER 18, 2004

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION; NO. CIV2003-8565; HON. TIMOTHY DAVIS FOX, JUDGE;
AFFIRMED

DONALD L. CORBIN, Associate Justice

Appellants Gary Kent Jones and Jean L. Jones appeal the order of the Pulaski County Circuit Court granting summary judgment to Appellees Linda K. Flowers and Mark Wilcox, as Commissioner of State Lands ("Commissioner"). The Joneses raise the following arguments on appeal: (1) the trial court erred in ruling that Ark. Code Ann. § 26-37-202(e) (Repl. 1997) is constitutional; and, (2) the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address. As this case implicates a constitutional challenge to a statute, it was certified to us from the Arkansas Court of Appeals. Our

jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

In 1967, Mr. Jones purchased real property located at 717 North Bryan Street in Little Rock, Arkansas. He lived there with his wife until 1993, at which time he moved out of the home and into an apartment. After moving, Mr. Jones failed to notify the tax collector of his new address. Mrs. Jones continued to live in the home after her husband moved out. Mr. Jones failed to pay his real property taxes for the years 1997, 1998, 1999, and 2000. Mr. Jones's real property was subsequently certified to the Commissioner as delinquent on February 24, 2000. The Commissioner then sent notice, via certified mail, to Mr. Jones of the delinquency and his right to redeem. The notice also stated that the real property would be subject to a public sale on April 17, 2002. This notification was returned to the Commissioner as "unclaimed." On April 1, 2002, a notice of the public sale was published in the Arkansas Democrat Gazette.

No bids were made on the real property at the public sale, but on February 5, 2003, Ms. Flowers submitted an offer to purchase the real property. On February 19, 2003, the State sent, via certified mail, a notice of the proposed tax sale to Mr. Jones at the Bryan Street address. According to the notice, the real property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. This notice was also returned to the State as unclaimed. Ms. Flowers subsequently purchased the home through a negotiated sale on May 28, 2003. The purchase price was $21,042.15. On or about July 2, 2003, an unlawful detainer notice was posted on the door of Mr. Jones's property.

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he never received actual notice of the tax sale or of his right to redeem. According to his

complaint, the tax sale resulted in an unlawful taking of his property without due process. Ms. Flowers filed a counterclaim for unlawful detainer on August 20, 2003. In his answer to the counterclaim, Mr. Jones admitted that he received actual notice of Ms. Flowers's notice to vacate, posted on the property on July 2. Mr. Jones then filed an amended complaint on September 17, 2003, adding his wife as a plaintiff, as she was the person living in the home at the time of the tax sale. Ms. Flowers filed a motion for summary judgment on October 2, 2003, arguing that the notices sent by the State complied with procedural due process. Thus, according to Ms. Flowers's motion, no fact issues remained to be determined. A similar motion for summary judgment was filed by the Commissioner on November 17, 2003.

On November 24, 2003, the Joneses filed a motion for summary judgment, arguing that the Commissioner admitted that it had no knowledge of their receiving notice of the forfeiture and subsequent sale. According to their motion, the Joneses claimed that there were no issues of fact to be resolved and, thus, summary judgment in their favor was appropriate. Attached to the motions were affidavits by Mr. Jones and Mrs. Jones averring that they never received notice of their right to redeem the property after the tax sale.

On January 14, 2004, the trial court entered an order finding that Ark. Code Ann. § 26-37-301 (Repl. 1997) complied with the constitutional requirements of due process. The trial court then granted Ms. Flowers's and the Commissioner's motions for summary judgment and denied the Joneses' motion. The trial court also granted Ms. Flowers's counterclaim for unlawful detainer and ordered that she was entitled to immediate possession of the real property. This appeal followed.

For their first argument on appeal, the Joneses aver that section 26-37-202(e) is unconstitutional because it does not require

notice of the property owner's right to redeem after the tax sale. Thus, according to their argument, the sale of the property is void, and they are now entitled to redeem the property. Ms. Flowers and the Commissioner contend that the Joneses' argument on this point is without merit.

We will not address the merits of this argument because the trial court did not rule on the issue of whether section 26-37-202(e) is unconstitutional for failing to include a notice requirement. We have repeatedly stated that a party's failure to obtain a ruling is a procedural bar to consideration of the issue on appeal. *Rigsby v. Rigsby*, 356 Ark. 311, ___ S.W.3d ___ (2004); *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002). Moreover, in *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003), this court held that constitutional arguments must be raised and fully developed in the trial court. It is also well settled that the burden of providing a record sufficient to demonstrate error is upon the appellant. *Id.*

The record in the instant case reveals that this issue was raised for the first time in a "Brief In Support of Motion for Summary Judgment" filed by the Joneses on November 24, 2003. In that brief, they argued that Act 626 of 1983 was constitutionally defective because it did not require notification of the "second redemption period." This issue was further raised by the Joneses in "Plaintiffs' Memorandum to Defendants' Response to Motion for Summary Judgment." The trial court's order, however, does not address this issue. Moreover, it would have been inappropriate for the trial court to consider the issue as it was raised only in the Joneses' briefs and not in their motion for summary judgment. This court has held that it would be error for a trial court on motion for summary judgment to consider any issues raised for the first time in a party's briefs or exhibits. *Eldridge v. Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989); *see also City of Barling v. Fort Chaffee Redev. Auth.*, 347 Ark. 105, 60 S.W.3d 443 (2001). Accordingly, the Joneses'

argument regarding the constitutionality of section 26-37-202(e) is not preserved for our review.

As their second point on appeal, the Joneses argue that the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address after the tax-sale notices were returned to the State unclaimed. In other words, they argue that the trial court erred in ruling that the State's sale of his property was constitutional under section 26-37-301. They further argue that due process required the State to conduct a reasonable search of public records in an attempt to ascertain Mr. Jones's correct address before selling his property. Ms. Flowers and the Commissioner counter that an attempt to provide actual notice is all that is required in order to comply with the requirements of due process. We agree.

As a general rule, in reviewing the grant of a motion for summary judgment, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000). This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

However, in the instant case, the granting of the motion for summary judgment was based upon the trial court's interpretation of a statutory provision. We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d

214 (2001).

We begin our analysis by reviewing the language of section 26-37-301, which provides in relevant part:

> (a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.
>
> (2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.
>
> (b) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale. The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

This court has repeatedly held that in cases involving redemption of tax-delinquent lands strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his or her property. *Tsann Kuen Enters. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003); *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993). Here, the Joneses would have this court read a requirement into section 26-37-301 that is simply not there, namely, that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed. The question then becomes whether such action is required in order to comply with the constitutional dictates of due process. We think not.

The Fourteenth Amendment of the United States Constitution

provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. 14, § 1. In discussing due process requirements, the United States Supreme Court has stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Our own cases interpreting this well-established rule of law are consistent with this principle.

Most recently in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, this court held that section 26-37-301 satisfies the requirements of due process and provides sufficient notice to nonresident landowners prior to their property being sold. In that case, Tsann Kuen Enterprises was a nonresident corporation that purchased real property in Bentonville. After the purchase, the company moved its corporate offices and failed to notify the Benton County Tax Collector of its new address. After the company failed to pay its real property taxes for four years, the tax collector certified to the Commissioner that the taxes on the property were delinquent. The Commissioner then sent a notice of delinquent taxes to the company's last known address. The notice was returned marked "unclaimed" and "forwarding order expired." The Commissioner again sent a notice to that same address, via certified mail, stating that unless the taxes were paid, the property would be sold on July 28, 2002. That notice was returned as well, and the Commissioner then published notice in a local newspaper, as well as the statewide newspaper. No taxes were paid and the property was sold. The new owners filed a complaint in unlawful detainer. The company answered and argued, in part, that the notice provision of section 26-37-301 was unconstitutional. The trial court denied the company's request that the statute be found unconstitutional and an appeal

to this court followed.

On appeal, this court rejected the company's argument that had the State posted notice on the property or mailed notice to the physical address, the caretaker living there would have notified the company's owner, and he would have paid the taxes. In so doing, this court recognized that while Tsann had an interest in the property sold, the court also had to consider the State's interest and whether additional procedural safeguards would be unduly burdensome to the State. The court then pointed out that pursuant to Ark. Code Ann. § 26-35-705 (Repl. 1997), the taxpayer has the obligation to furnish his or her correct address.

In concluding as it did, the *Tsann* court relied on its previous decision in *Jones*, 352 Ark. 39, 98 S.W.3d 405. *Jones* also involved the sale of real property after the owner failed to pay the real property taxes. After the sale, the property owner brought suit against the Commissioner, arguing that it had failed to comply with the requirements of section 26-37-301. The trial court ruled that the Commissioner complied with the statutory provision. This court likewise held that the Commissioner strictly complied with section 26-37-301 when, prior to the tax sale, it sent notice by certified mail to the last known address of the property owner. *Id.* Moreover, this court in *Jones* held that section 26-37-301 does not require the Commissioner to take every step possible to ensure that the notice arrives in the property owner's hand. Noting that the notice was returned "unclaimed," the court went on to elaborate that the Commissioner was merely required to notify the owner at the owner's last know address. *Id.*

The *Jones* court also pointed out that the facts before it were analogous to the facts presented to the court of appeals in *Wilson v. Daniels*, 64 Ark. App. 181, 980 S.W.2d 274 (1998). In that case, the court of appeals held that the Commissioner complied with the notice requirement when it mailed a second

notice to the taxpayer's correct address, despite the fact that the notice was returned unclaimed. *Id.*

In their brief to this court, the Joneses argue that our holding in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, does not apply or, alternatively, that it should be overruled as violating federal due process. They make no attempt to distinguish this court's holding in *Jones*, 352 Ark. 39, 98 S.W.3d 405, and we are unpersuaded by either of their arguments regarding *Tsann*. First, the distinction that the property owner in *Tsann* was a nonresident corporation is of no merit. The Joneses argue that the distinction is critical because their situation involves a property owner losing his homestead, while *Tsann* involved a corporation losing a rental property. To support their argument on this point, the Joneses point to the fact that the General Assembly amended section 26-37-301 in 2003, indicating a desire to afford greater protection to an owner of a homestead. A similar argument was raised and rejected by this court in *Tsann*. There, the property owner argued that the General Assembly amended section 26-37-301 by Act 1376 of 2003 in order to remedy the unfairness of the statute.[1]

In rejecting this argument, this court stated:

The problem with this argument is that Act 1376 of 2003 does

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[1]Act 1376 provides, in part:

> If the Commissioner of State Lands fails to receive proof that the notice sent by certified mail under this section was received by the owner of a homestead . . . then the Commissioner of State Lands, or his or her designee, shall provide actual notice to the owner of a homestead . . . by personal service of process at least sixty (60) days before the date of sale.

not become effective until January 1, 2004. We have stated that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant. *Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001). The general rule is that one must have suffered injury or belong to that class that is prejudiced in order to have standing to challenge the validity of a law. *Id.* Tsann Kuen cannot show that it suffered injury due to the application of the amended version of § 26-37-301 since the amended version does not become effective until January 1, 2004, and was not applied in the present case.

Id. at 122, 129 S.W.3d at 829. Likewise, the Joneses cannot demonstrate that they were injured simply because the legislature later amended section 26-37-301. A right to redeem from a tax sale is governed by the statute in force and effect at the time the sale was made. *Hogg v. Nichols*, 134 Ark. 280, 204 S.W. 211 (1918). Accordingly, the Joneses' argument simply does not support the conclusion that the holding in *Tsann* is inapplicable to homestead property owners.

Nor do we agree with the Joneses' contention that the extra safeguards sought by the property owner in *Tsann* were more burdensome than those sought here. Here, the Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

The Joneses next contend that if this court construes *Tsann* to be applicable in this case, it should be overruled. In support of this contention, they argue that a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address. Ms. Flowers and the Commissioner contend that there is no reason

to revisit an issue already decided by this court. We agree.

The very fallacy of the Joneses' argument in this regard is supported by their admission in their brief to this court that due process does not require actual notice before depriving a property owner of his property. Citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), the Joneses argue that while actual notice may not be required, such notice must be reasonably calculated to apprise a party of its rights. According to the Joneses, it is unreasonable for the State not to attempt to locate a property owner's correct address. In fact, in *Dusenbery*, the Court held that a state complied with the requirements of due process when it attempted to provide actual notice. In that case, officials seized drugs, weapons, and personal property, including cash, after arresting Dusenbery. After his conviction, the FBI sent by certified mail a notice of forfeiture proceedings to the address where he was arrested, as well as to an address in his mother's hometown. Dusenbery challenged the forfeiture, arguing that his due process rights were violated because he did not receive actual notice of the proceeding. To support his contention, Dusenbery relied on a previous Supreme Court decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), and argued that in that case the Court held that actual notice must be given. The Court rejected that argument and stated that there is no requirement that actual notice be given in order to comply with the requirements of due process.

Here, there is no dispute that the State attempted to provide the Joneses with notice, both via certified mail and through publication in the newspaper. Accordingly, we cannot say the trial court erred in concluding that the State complied with the provisions of section 26-37-301 and that the tax sale was valid.

Affirmed.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FILED
2004 JAN 14 PM 2:54
CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES AND
JEAN L. JONES

PLAINTIFFS

VS. CASE NO. CV 2003-8565

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF
STATE LANDS, STATE OF ARKANSAS

DEFENDANTS

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

On the 12th day of January, 2004, came on for consideration the pending motions in this case and from the pleadings filed herein and all other matters properly before the court the court doth find as follows:

1. The *Motion for Summary Judgment* of the defendant Flowers filed on or about October 2, 2003 is granted.

2. The *Motion for Summary Judgment* of the defendant Wilcox filed on or about November 17, 2003 is granted.

3. The Motion for Summary Judgment of the plaintiffs filed on or about November 24, 2003 is denied.

4. A.C.A. § 26-37-301, as codified at all times relevant to this action, did not violate any due process requirements of the Arkansas or United States Constitutions.

5. The Complaint of the plaintiffs is dismissed with prejudice.

6. The Counterclaim for Unlawful Detainer of the defendant Flowers is granted and the defendant is entitled to immediate possession of the subject real property.

IT IS SO ORDERED.

/s/

TIMOTHY DAVIS FOX
CIRCUIT JUDGE

1/12/04

DATE

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas

Leslie W. Steen
Clerk

January 6, 2005

Paul Johnson Jr
Attorney at Law
P.O. Box 21009
Little Rock, AR 72221

RE: 04 00449 Gary Kent Jones et ux. V. Linda K. Flowers, et al.

Dear Mr. Johnson:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/
Leslie W. Steen, Clerk

LWS:jko
cc: Mark Justin Riable
A.J. Kelly
Carol Ann Lincoln
Pat O'Brien, Clerk
(CV2003-8565)